ORIGINAL



NO. 83-6020

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

ROBERT DOUGLAS SMITH,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

# RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## Questions Presented

1. Was petitioner denied his constitutional right to due process where he and his codefendant were tried in a single trial before two juries?

2. Was the death penalty properly imposed in petitioner's case?

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## STATEMENT OF THE CASE

Petitioner and his codefendant, Joe Leonard Lambright, were tried in a single trial before two juries for first-degree murder, kidnapping, and sexual assault in Pima County Superior Court cause number CR-05669. The victim of the above offenses was Sandra Owen, a young woman with a history of mental problems. The evidence presented at trial through the testimony of Kathy Foreman showed that in February and March of 1980, petitioner, Lambright, and Foreman traveled from Texas to Florida, back to Texas, then to Tucson, Arizona. Foreman was Lambright's girl friend at the time, and the two frequently had sex together while petitioner was present. After they arrived in Arizona, Lambright and Foreman again engaged in sex together in Smith's presence while the trio was camped in the mountains outside Tucson. Smith became angry and complained because Lambright had all the sex he wanted. Lambright asked Smith why he did not find someone to have sex with, and Smith replied that it was not so easy. The two men then walked away together and talked for several minutes.

The following day, the trio went into Tucson and were having coffee at a restaurant when Smith once again indicated that he wanted a woman. Foreman left for a few minutes. When she returned, she overheard Lambright say to Smith that he "would like to kill somebody just to see if he could do it." When Foreman asked them what was going on, Lambright told her that they were going to find somebody for Smith. They then drove around Tucson and eventually picked up the victim, who was hitchhiking. She told them she needed a ride to the food stamp

office. Lambright drove to the food stamp office, but instead of letting the victim out of the car, he jumped into the backseat with her and told her she would not get hurt if she kept quiet. The victim was trembling and appeared to be frightened. Petitioner drove the car to the interstate. He then got into the backseat with the victim while Lambright drove. Petitioner covered the back windows with shirts and a blanket, then raped the victim.

Lambright drove the car off the interstate and into a mountain area. All four of the individuals walked up the mountain. Petitioner raped the victim a second time while Foreman and Lambright engaged in sex nearby. Foreman and Lambright walked up a hill and talked about whether to let the victim go. They heard scuffling, turned and saw petitioner choking the victim from behind. While the victim struggled, Lambright took Foreman's knife out of her back pocket, approached the victim and started stabbing her in the chest. He twisted and turned the knife inside the victim while stabbing her. Petitioner did not appear surprised and did not say anything when Lambright started stabbing the victim. When the victim slumped to the ground, petitioner went down with her and grabbed one of her arms. Foreman grabbed her other arm as Lambright continued to stab her. Petitioner grabbed her head and tried to break her neck by twisting her head around. When he was unable to break the victim's neck, Lambright started sawing at her neck with the knife and buried the blade in her neck. They started to leave, and Foreman turned and saw the victim raise up on her elbow. She yelled at Lambright, and he picked up a large rock and threw it at the

victim's head, as he yelled "Die, bitch." Petitioner and Lambright drug the victim over to where they had built a campfire. Lambright took her jewelry and they piled rocks on her.

The trio returned to their car and headed back to the interstate. Petitioner had Foreman hand him a tape with a song on it entitled "We Are the Champions." He played the song as he and Lambright smiled and laughed about killing the victim. Lambright asked them if they saw the victim's head bounce when he threw the rock at her.

Petitioner and his traveling companions drove to San Diego, where they pawned the victim's wedding ring for gasoline money. After a stop at Disneyland, they returned to Texas. Foreman stayed with Lambright for 4 or 5 days, then moved in with another man. She testified that she did not go to the police because Lambright told her the same thing that had happened to the victim would happen to her if she said anything. Petitioner told Foreman that he would help Lambright kill her if she talked. Foreman did not talk until she was contacted by police officers approximately 1 year after the homicide had occurred. She returned to Arizona and attempted to help the officers locate the victim's body. Prior to petitioner and Lambright's trial, Foreman agreed to testify against them. She was given immunity from prosecution in exchange for her testimony. Foreman admitted on cross-examination that some time after their return to Texas she pulled a knife on Lambright, but that she looked at the knife then threw it away. She also admitted that she got drunk and smashed her car into a car in which Lambright and another woman were riding.

After his arrest, petitioner made a number of statements to police officers. In his first statement, he admitted kidnapping and raping the victim. He also admitted choking the victim, but claimed he was choking her in order to make her pass out so that they could make their getaway. He claimed that while he was choking the victim, Foreman grabbed a knife and started stabbing her. In his second statement, petitioner stated that it was Lambright who actually stabbed the victim, and explained that he had been trying to protect Lambright. In his third statement, petitioner stated that he choked the victim until she passed out. Lambright then came over and stabbed the victim in the chest, after saying, "We can't let her live." Petitioner stated that he was not sure, but he believed Foreman attempted to saw the victim's neck after Lambright stabbed her. Lambright then picked up a big rock and hit the victim in the head with it. Petitioner and his companions piled rocks on the victim's body and left. Petitioner did not claim in any of the statements he made to police officers that his purpose in choking the victim was to protect her from Lambright and Foreman, who allegedly had expressed an intention to engage in unusual sexual acts with her.

Although petitioner sets forth Lambright's version of the murder in his petition, it should be noted that none of Lambright's statements to police officers were admitted in evidence at petitioner's trial.

On March 30, 1982, petitioner's jury returned its verdicts finding petitioner guilty of first-degree murder, sexual assault, a dangerous offense, and kidnapping, a dangerous offense. Following an aggravation/mitigation hearing, the trial court found

that petitioner had murdered the victim in an especially heinous, cruel, or depraved manner, and imposed the death penalty on him. Lambright's jury convicted him of first-degree murder, sexual assault and kidnapping, and the trial court also imposed the death penalty on him. Although petitioner claims that his conviction was for first-degree felony murder, the matter was submitted to the jury on a premeditated murder theory as well as a felony-murder theory. The verdict does not reflect which theory the jury relied upon in returning its verdict finding petitioner guilty of first-degree murder.

Petitioner appealed his conviction for first-degree murder to the Arizona Supreme Court and in an opinion filed September 28, 1983, that court affirmed his conviction and the imposition of the death penalty. State v. Smith, No. 5595 (Ariz.Sup.Ct., Sept. 28, 1983). Lambright also appealed his murder conviction to the Arizona Supreme Court. Lambright's conviction for first-degree murder and the imposition of the death penalty were affirmed in State v. Lambright, No. 5594 (Ariz.Sup.Ct., Sept. 28, 1983). The Lambright opinion contains the facts necessary to a determination of petitioner's appeal, and a resolution of the first eight issues petitioner raised on appeal, including the propriety of the dual jury procedure used to try petitioner and Lambright.

Following the affirmance of his conviction, petitioner filed a motion for rehearing in the Arizona Supreme Court. After that court denied his motion, petitioner filed a petition for writ of certiorari in this Court. This Court has jurisdiction in this matter pursuant to 28 U.S.C. § 1257(3).

## ARGUMENTS

### I

### PETITIONER WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS WHERE HE AND HIS CODEFENDANT WERE TRIED IN A SINGLE TRIAL BEFORE TWO JURIES.

As his first issue, petitioner claims that use of a dual jury system violated his constitutional right to due process in violation of the Fourteenth Amendment of the United States Constitution. Prior to trial, the trial court determined that the present case could present problems under the doctrine of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), as petitioner's and Lambright's confessions did not overlap in all respects. In order to resolve this problem, the trial court severed the two cases, but ordered them tried in a single trial before two juries. Petitioner and Lambright both objected to the dual jury procedure at trial, and contended on appeal that the procedure had served to deny them their constitutional right to due process.

In its opinion in Lambright, the Arizona Supreme Court rejected that argument, noting that a number of courts had approved the dual jury procedure, and had found that the dual jury procedure protected a defendant's constitutional rights as well as serving the ends of judicial economy. See, e.g., United States v. Hayes, 676 F.2d 1359, 1366-67 (11th Cir.), cert. denied, ____U.S.____, 103 S.Ct. 455, ___ L.Ed.2d____ (1982); United States v. Rimar, 558 F.2d 1271 (6th Cir.), cert. denied, sub nom. Rimer v. United States, 435 U.S. 922, 98 S.Ct. 1484, 55 L.Ed.2d 515 (1978); United States v. Rowan, 518 F.2d 685, 689-90 (6th Cir.), cert. denied, sub nom. Jackson v. United States, 423 U.S. 949, 96 S.Ct. 368, 46 L.Ed.2d 284 (1975); People v. Wardlow, 118

Cal.App.3d 375, 382-87, 173 Cal.Rptr. 500, 502-05 (1981); People v. Brooks, 92 Mich.App. 393, 285 N.W.2d 307 (1979). The court noted that a number of other courts had given limited approval to the dual jury procedure after suggesting that appropriate guidelines be developed before putting the procedure to common use. See, e.g., United States v. Sidman, 470 F.2d 1158, 1170 (9th Cir. 1972); State v. Watson, 397 So.2d 1337, 1342 (La. 1981), cert. denied, 454 U.S. 903, 102 S.Ct. 410, 70 L.Ed.2d 222 (1981).

The Arizona Supreme Court went on to discuss those courts that had disapproved the use of a dual jury procedure, but noted that even those courts had been unanimous in refusing to reverse a defendant's conviction based merely on the use of a dual jury procedure absent a specific showing of prejudice. The Arizona Supreme Court refused to find the dual jury procedure inherently prejudicial, even though it did not sanction the future use of such a procedure as it is not authorized by the Arizona Rules of Criminal Procedure. Respondent submits that the Arizona Supreme Court did not err in its determination that there is no inherent prejudice to a defendant by the use of a dual jury system.

Petitioner also argued to the Arizona Supreme Court that use of a dual jury procedure is inherently prejudicial in a first-degree murder case in which the death penalty may be imposed.[1] In summarily rejecting petitioner's

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1. Petitioner states that this Court has often recognized that death penalty cases are inherently different from other cases. Petitioner has apparently misread this Court's opinions. What this Court has recognized is that imposition of the death penalty is profoundly different from all other penalties. Eddings v. Oklahoma, ____U.S.____, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978).

argument, the Court noted that the dual jury procedure had been utilized in other murder cases, see, e.g., People v. Church, 102 Ill.App.3d 155, 429 N.E.2d 577 (1981); State v. Corsi, 86 N.J. 172, 430 A.2d 210 (1981), including one in which the death penalty had been given and affirmed, see People v. Williams, ____Ill.2d____, ____N.E.2d____, rev'd on other grounds, 93 Ill.2d 309, 444 N.E.2d 136 (1982).

After rejecting petitioner's argument that the dual jury procedure was inherently prejudicial, the Arizona Supreme Court went on to address the question whether petitioner had suffered any prejudice in the present case by use of that procedure. Petitioner argued that his right to due process was violated because the trial court gave the following explanation to the prospective jurors regarding the dual jury procedure that was being utilized to try petitioner and Lambright:

> For some legal reasons the evidence that the State will present, some of the evidence is admissible against Mr. Smith and not against Mr. Lambright; some of the evidence is admissible against Mr. Lambright but not against Mr. Smith. For that reason you are one of two jurys [sic] that will be chosen this afternoon.

Petitioner contends that he was prejudiced by the preceding statement because it was an invitation to the jurors to speculate regarding evidence they would not be allowed to hear. In rejecting petitioner's contention, the Arizona Supreme Court stated:

> We believe that the above explanation of the procedure was more likely to reduce rather than increase speculation by the jurors. Furthermore, to the extent that through this explanation the jury became aware that there is evidence which they will not hear for legal reasons, we note that this occurs numerous times during

> the usual criminal trial whenever the judge sustains an evidentiary objection.

State v. Lambright, supra, slip op. at 13 (citation omitted). Respondent submits that the Arizona Supreme Court's analysis of the situation was correct. Petitioner, however, argues that the trial court's remarks to the prospective jurors cannot be analogized to a trial judge sustaining an evidentiary objection, as the jury is usually made aware of the basis of an evidentiary objection. Respondent submits that petitioner is attempting to make a distinction between the two situations where there is none. There is no real difference between a trial court telling jurors they are not going to hear certain evidence for legal reasons and between a trial court sustaining objections to evidence for various legal reasons -- hearsay, no proper foundation, calling for a conclusion, not the best evidence, privileged communication, self-incrimination, opinion by a nonexpert witness, etc. For the same reasons that a defendant in a typical jury trial may not claim prejudice merely because the jury is made aware that certain evidence is inadmissible for legal reasons, petitioner should not be heard to argue that he was prejudiced because his jury was informed that certain evidence was inadmissible as to him. The Arizona Supreme Court properly rejected petitioner's claim that he was denied his right to due process by the trial court's remark.

In support of his argument that he was prejudiced by the trial court's comment to the jury, petitioner cites State v. Hunt, 8 Ariz.App. 514, 447 P.2d 896 (1968). In that case, the defendant was charged with aggravated assault and battery upon his 5-year-old child and with contributing to the child's delinquency and dependency. On

appeal, the defendant claimed that the prosecutor committed reversible error in telling the jurors during closing argument that there were certain things that the state could not get into evidence. The court of appeals agreed with the defendant that the prosecutor's comments were improper as they contained an inference that the defendant had committed acts of misconduct toward his child other than those for which he was on trial. The court, however, held that the prosecutor's comments did not rise to the level of reversible error as they did not result in a denial of the defendant's right to a fair trial. As the court noted:

> [W]e do not feel that the vague statement made by the prosecution in this case was sufficiently prejudicial to warrant reversal. The defendant cites no authority, and we are unable to find any, in which a similar statement has been held to be reversible error.

State v. Hunt, supra, 8 Ariz.App. at 523. It is readily apparent that there was a real possibility that the prosecutor's statement in Hunt could have prejudiced the defendant. There is no such possibility in the present case that petitioner could have been prejudiced by the trial court's comment.

Petitioner also cites this Court to State v. Moore, 108 Ariz. 215, 495 P.2d 445 (1972), in support of his claim of error. Respondent submits that petitioner's reliance on Moore is totally misplaced. In that case, the court held that it was reversible error for the prosecutor to present evidence of an unrelated robbery and attempted murder in the defendant's robbery trial. No such evidence was presented against petitioner, nor could the existence of such evidence have been inferred from the trial court's statements to the prospective jurors.

II

THE DEATH PENALTY WAS PROPERLY IMPOSED IN PETITIONER'S CASE.

Petitioner next claims that the death penalty is impermissible in his case under the rule announced by this Court in Enmund v. Florida, ____U.S.____, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), which places limits on the imposition of the death penalty based on accomplice or felony-murder theories. In Enmund, this Court held that imposition of the death penalty would violate the Eighth and Fourteenth Amendments where the defendant did not kill, attempt to kill, or intend to kill. Petitioner argued to the Arizona Supreme Court that because his case was submitted to the jury on both premeditation and felony-murder theories, the jury's verdict of first-degree murder did not establish that he killed, attempted to kill, or intended to kill, and that the death penalty was thus improperly imposed in his case. In rejecting petitioner's argument, the Arizona Supreme Court noted that:

> The trial court clearly found that defendant both killed and intended to kill. The trial judge made specific findings that Smith and Lambright discussed killing the victim, that the killing commenced when Smith began strangling the victim, and that Smith held the victim while she was being stabbed. We have reviewed the record and find the evidence supports these findings. Because the defendant participated in the killing, and intended to kill, the death penalty is not impermissible under Enmund v. Florida, supra.

State v. Smith, supra, slip op. at 13.

Respondent submits that the Arizona Supreme Court did not err in determining that there was ample evidence in the record to support a finding that petitioner intended to kill the victim, and that he participated in the killing.

Petitioner, however, claims that the Arizona Supreme Court erred in finding that he was an active participant in the murder of the victim because that finding is based entirely upon the testimony of an accomplice who was given immunity. Petitioner is mistaken. Even totally discounting the testimony of Kathy Foreman, there is ample evidence in the record to support a finding that petitioner's participation in the murder of Sandra Owen was major. In his confession, petitioner admitted that he and his accomplices kidnapped the victim, admitted that he had raped her, and admitted that as soon as he had raped the victim, he choked her until she passed out. According to petitioner, he then watched as Foreman and Lambright stabbed the victim to death. Petitioner admitted aiding his accomplices in concealing the body by helping them pile rocks on it. Thus, even giving credence to petitioner's version of the events in question, it is clear that he actively participated in the murder, and that imposition of the death penalty was permissible under Enmund v. Florida, supra. It is true that petitioner claimed that he did not intend to kill the victim and that he only choked her so that she would pass out, thus enabling him and his cohorts to make their getaway. Petitioner's story regarding the reason he grabbed the victim from behind and strangled her until she passed out is inherently incredible. The jury rejected it, the trial court rejected it, and the Arizona Supreme Court gave it all the credence to which it was entitled -- absolutely none. However, in view of undisputed evidence that petitioner actively participated in the murder, there was no need for the court to even make an additional finding that petitioner intended to kill the victim in order for the court to find that he was not

entitled to the protection of Enmund. Thus, petitioner's claim that he was subjected to the death penalty solely on the testimony of Kathy Foreman is devoid of merit.

For the sake of argument, respondent will assume that petitioner was subjected to the death penalty based solely upon the testimony of Kathy Foreman. Even assuming that he was, petitioner has given this Court no sound reason for setting aside his sentence of death. He makes a number of vague assertions regarding the reliability of Foreman's testimony. According to petitioner, the fact that Foreman was given complete immunity for her participation in the murder of Sandra Owen somehow destroys the reliability of her testimony. He reasons that her agreement with the state gave her a motive to lie. To the contrary, the agreement only guaranteed Foreman immunity from prosecution if she testified truthfully against petitioner and Lambright. There is nothing to indicate that she did not abide by the agreement. It should be noted that Foreman did not attempt to minimize her own reprehensible behavior when she told her story to the jurors. She freely admitted watching in the rearview mirror while petitioner raped the trembling, frightened kidnap victim. She admitted guarding the victim when the victim was allowed to relieve herself behind some bushes, so that she would not escape. She admitted that she held the victim's arm while Lambright repeatedly stabbed her. She admitted assisting Lambright and Smith in piling rocks on top of the victim's body after she was dead or dying.

Petitioner infers in his argument that the Arizona Supreme Court found that Foreman's testimony was unreliable. In support of this contention, he relies on an alleged inconsistency in the court's opinions in Lambright

and Smith. He reasons that the court was expressing doubt regarding Foreman's reliability because it declined to rely on her testimony in finding that Lambright had a heinous and depraved attitude toward the killing, yet relied on her testimony in finding that petitioner was outside the protection of Enmund v. Florida, supra. Petitioner is mistaken. It is apparent that the court did rely on Foreman's testimony in finding that Lambright had a heinous and depraved attitude, as the court stated in its opinion:

> A heinous and depraved state of mind is also demonstrated by Lambright's participation in the macabre celebration of the killing during which the group played the song "We are the Champions."

State v. Lambright, supra, slip op. at 27. Evidence regarding the macabre celebration came solely from the testimony of Foreman, and it is apparent that the court did rely on that testimony in finding that Lambright had a heinous and depraved attitude toward the killing. The fact that the court indicated in a footnote that it did not need to rely on other testimony from Foreman to find the existence of that aggravating circumstance does not alter that fact. It is clear that the court was merely emphasizing the strength of the evidence it did rely on in making its finding.

In support of his argument that Foreman's testimony was unreliable, petitioner cites this Court to Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). In that case, the state sentencing procedure permitted the trial judge to impose the death penalty upon a defendant on the basis of a presentence report containing confidential information that had not been disclosed to the defendant or his attorney. This Court set aside the death penalty that had been imposed, holding that it was not

justified in view of the risk that some of the information accepted in confidence could be erroneous or could be misinterpreted by the trial judge. The present situation contains no similarities to Gardner. Foreman testified under oath in open court against petitioner. She was subjected to extensive cross-examination by petitioner's counsel, and petitioner was afforded the opportunity to present evidence refuting her testimony.

Petitioner also cites this Court to two other cases which he contends support his argument that he was sentenced to death on the basis of unreliable testimony: Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Respondent submits that neither of the above cases has any bearing on the issue petitioner has raised.

Finally, petitioner argues that he is entitled to have his death penalty set aside on the basis that the punishment he received was disproportionate to the treatment afforded Kathy Foreman, an admitted participant in the murder. As noted previously, Foreman was given complete immunity for her part in the killing. Both the trial court and the Arizona Supreme Court indicated that they were appalled at the lenient treatment afforded Foreman. However, the trial court determined that petitioner should be sentenced to death for his part in the cruel and brutal murder of Sandra Owen, and the Arizona Supreme Court upheld the imposition of that penalty. In arguing that a sentence of death was not properly imposed in his case, petitioner attempts to minimize his culpability in the murder. Petitioner is apparently asking this Court to ignore the fact that it was his desire for a

woman to have sex with that led to the kidnapping of the victim, the fact that he raped the victim twice, and the fact that he set in motion the chain of atrocities that culminated in the death of the victim when he proceeded to strangle her immediately after the second rape. The death penalty was proper in petitioner's case. While it is regrettable that Foreman received no punishment for her part in the murder, that fact does not serve to lessen petitioner's culpability in any manner, especially in view of the fact that the other participant in the cruel murder of the victim also received the death penalty.

In any case, respondent submits that petitioner's proportionality argument is devoid of merit in view of this Court's recent opinion in Pulley v. Harris, 44 CCH S.Ct.Bull. P.B. 968 (U.S., Jan. 23, 1984), in which the court held that a comparative proportionality review in death penalty cases is not constitutionally required.

## CONCLUSION

Petitioner was not denied his constitutional right to due process by virtue of the dual jury procedure utilized by the trial court. Petitioner was properly sentenced to death where there was ample evidence in the record that he intended to kill the victim and that he participated in the killing. For all the preceding reasons, respondent respectfully requests this Court to deny petitioner's petition for writ of certiorari.

Respectfully submitted,

ROBERT K. CORBIN
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Criminal Division

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Attorneys for RESPONDENT

# A F F I D A V I T

STATE OF ARIZONA )
) ss.
COUNTY OF MARICOPA )

GEORGIA B. ELLEXSON, being first duly sworn upon oath, deposes and says:

That she served the attorney for the petitioner in the foregoing case by forwarding two (2) copies of RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

LAWRENCE H. FLEISCHMAN
Assistant Public Defender
45 West Pennington
Tucson, Arizona 85701
Attorney for PETITIONER

this 1st day of February 1984.

Georgia Ellexson
GEORGIA B. ELLEXSON

SUBSCRIBED AND SWORN to before me this 1st day of February, 1984.

Chris L. Piske
CHRIS PISKE
NOTARY PUBLIC

My Commission Expires:
October 28, 1985

34-195
43D clp

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc



STATE OF ARIZONA,
Appellee,
v.
ROBERT DOUGLAS SMITH,
Appellant.

No. 5595

Appeal from the Superior Court of Pima County
Cause No. CR-05669
The Honorable Michael J. Brown, Judge
AFFIRMED

Robert K. Corbin, The Attorney General — Phoenix
By William J. Schafer III and Barbara A. Jarrett,
Assistant Attorneys General
Attorneys for Appellee

Frederic J. Dardis, Pima County Public Defender — Tucson
By Lawrence H. Fleischman, Assistant Public Defender
Attorneys for Appellant

CAMERON, Justice

Defendant, Robert Douglas Smith, was tried before a jury and convicted of first degree murder, A.R.S. § 13-1105, kidnapping, A.R.S. § 13-1304(A)(3), and sexual assault, A.R.S. § 13-1406. In addition, the kidnapping and sexual assault were found to have been dangerous felonies, involving the infliction of serious

EXHIBIT 1

physical injury, A.R.S. § 13-604. Defendant was sentenced to death for the murder, to 21 years imprisonment for the kidnapping, and to 21 years imprisonment for the sexual assault, to be served consecutively to the sentence for kidnapping. The case was automatically appealed to this court pursuant to Rules 26.15, 31.2(b), Arizona Rules of Criminal Procedure, 17 A.R.S.; we have jurisdiction pursuant to Art. 6, § 5(3) of the Arizona Constitution, and A.R.S. §§ 13-4031 and 13-4035.

The issues we must decide on appeal are:

I. Does the use of a dual jury procedure at trial constitute reversible error?

II. Did the trial court lack venue over the homicide charge?

III. Was it error to allow an official of the Pima County attorney's office to testify regarding the grant of immunity to an accomplice?

IV. Did the trial court err in failing to give one of the defendant's proffered jury instructions?

V. Is the Arizona death penalty statute unconstitutional?

VI. Is the statutory aggravating circumstance of killing in an "especially heinous, cruel, or depraved manner" unconstitutionally vague?

VII. Is there a right to have a jury participate in sentencing where the death penalty is imposable?

VIII. Is it unconstitutional to place the burden of proof of mitigating circumstances on the defendant?

IX. Did the trial court err in placing limits on recross-examination?

X. Were defendant's statements voluntary?

XI. Did the prosecutor's closing argument contain fundamental error?

XII. Did the trial court err in failing to instruct the jury on second degree murder?

XIII. Did the trial court properly exclude from evidence an exculpatory hearsay statement made by the defendant to a police officer?

XIV. Is imposition of the death penalty foreclosed in this case by Enmund v. Florida?

XV. Does the court find in its independent review that the death penalty was appropriate in this case?

XVI. Is the death penalty in this case proportionate to the disposition of other similar cases?

The first eight issues raised in this appeal have been decided and discussed in the companion case of State v. Lambright, ____ Ariz. ____, ____ P.2d ____ (No. 5594, filed this date). A summary of the facts necessary for the determination of this appeal is also contained in that opinion.

IX. LIMITATION OF RECROSS-EXAMINATION

Defendant asserts that the trial court erred in limiting his right to recross-examine the state's key witness, Kathy Foreman. The control of cross-examination is left to the sound discretion of the trial judge and will not be disturbed on appeal absent a showing from the record of an abuse of discretion. State v. Thomas, 110 Ariz. 106, 109, 515 P.2d 851, 854 (1973). Further,

> The right of confrontation and cross-examination of adverse witnesses is of fundamental importance, but it is not a right without limitation. It is well established in Arizona, as well as in many other jurisdictions, that there is no right to

> re-cross unless some new issue arises during redirect; otherwise, it is a matter of the trial court's sound discretion. (Citations omitted.) State v. Jones, 110 Ariz. 546, 550, 521 P.2d 978, 982, cert. denied 419 U.S. 1004, 95 S.Ct. 324, 42 L.Ed.2d 280 (1974), quoted in State v. Williams, 113 Ariz. 14, 16, 545 P.2d 938, 940 (1976).

In the instant case the judge offered the defendant a full opportunity to recross-examine the witness on any new areas brought out on redirect, and because he was tried together with another defendant, he also gave him the opportunity to conduct recross on any new point opened up on cross-examination by the co-defendant. Defendant's counsel declined to specify any new areas he wished to inquire into on recross-examination, so the trial judge did not permit recross-examination to proceed.

> A party has no right to use further cross-examination to repeat or re-emphasize matters already covered on direct or cross-examination. The court may inquire into the nature and purpose of the further cross-examination to determine whether to permit it or limit its scope. State v. Loftis, 89 Ariz. 403, 405-06, 363 P.2d 585, 587 (1961).

We find no error.

## X. VOLUNTARINESS OF STATEMENTS

Robert Smith was arrested at about 9:00 a.m. on 14 March 1981 at an apartment complex in South Houston, Texas. He was arrested by officer John W. Laird of the Texas Department of Public Safety, who was accompanied by Robert Petty, another Texas DPS officer, and two South Houston policemen. Officer Laird read Smith his Miranda rights, and Smith acknowledged that he understood them. No questions were asked at the time of arrest. Smith was taken to the South Houston Police Department, and a

magistrate was summoned. The magistrate advised Smith of the charges against him, and read him his constitutional rights a second time. Defendant then agreed to talk to agents Laird and Petty. The officers told him that Kathy Foreman had admitted her participation in the crimes and had implicated Smith. The officers also explained the nature of the charges against Smith. Smith then made his first confession. In this first statement, Smith set forth the basic facts surrounding this crime, including his substantial involvement in the incident. In this first statement he told authorities that Kathy Foreman was the person who actually stabbed the victim.

Officer Laird told Smith the story just did not sound right somehow, and asked if he was sure it was the truth. Smith then became somewhat emotional, and said he had lied in order to protect his friend Lambright.

He then made a second statement, which paralleled the first one except that Smith now stated it was Lambright who stabbed the victim, and that both Lambright and Foreman cut the victim's throat. After the second statement Smith asked if he could see his wife. The officers granted the request and arranged for her to come down and see him. He visited with his wife and her mother for approximately an hour. The officers went in and out of the room several times as they got food and beverages for themselves and Smith. The officers testified that while they were in the room the defendant and his wife were talking about religion, and they observed the defendant crying.

After seeing his wife, Smith met with Laird and Petty again,

and gave them a third statement which was similar to the second statement, but which was far more detailed. The defendant also expressed a willingness to give a written statement. Two days later he did give a written statement to the Texas authorities, after being given another set of constitutional warnings.

Defendant's final statement was made in Arizona to detective Gary Dhaemers of the Pima County Sheriff's Department. He agreed to answer questions in a taped interview. A transcript was made of the interview, which the defendant was given the opportunity to review, correct, and sign. The trial judge found that each of Smith's confessions was voluntary and admissible.

As we noted in State v. Lambright, supra, filed this date,

> The trial court must look to the totality of the circumstances surrounding the giving of the confession, as presented at "voluntariness" hearings, and decide whether the State has met its burden. However, the trial court's determination of admissibility will not be upset on appeal, absent clear and manifest error. (Citations omitted.) State v. Arnett, 119 Ariz. 38, 42, 579 P.2d 542, 546 (1978), quoted in State v. Osbond, 128 Ariz. 76, 78, 623 P.2d 1232, 1234 (1981). Accord State v. Dalglish, 131 Ariz. 133, 137, 639 P.2d 323, 327 (1982).

No clear and manifest error is present in the instant case. We do not find the circumstances surrounding the giving of these confessions to have been inherently coercive. Nor do we find it was improper, as suggested by defendant, for the officers, when explaining the charges against Smith, to accurately inform him that he had been implicated in the crime by Foreman.

Defendant further alleges as specific error the fact that detective Dhaemers brought the transcript of the last confession

directly to Smith for his review, instead of delivering it to his attorney. It is apparent, however, that when Dhaemers delivered the transcript to Smith for his corrections and signature, he fully apprised the defendant of his right to have counsel assist him. In officer Dhaemers' uncontradicted testimony, he stated:

> Well, I had gone through [the transcript] as best I could, and then I took it over to the jail and asked Mr. Smith if he wanted the opportunity to go through the transcript of the tape that he had given to me.
>
> He indicated that he did. He wanted to go through it.
>
> I advised him he had the right to have an attorney with him. He already had an attorney appointed to him and if he wanted that attorney there, he could have him there before we went through the statement and reviewed it.
>
> He indicated to me that his attorney said that -- had told him not to talk to anybody, but he wanted to talk to us and he wanted to go through his statement, his attorney would be mad at him because he did this, but he wanted to do this anyway.

This is not a case in which the police resorted to subterfuge in an attempt to deprive the defendant of his right to counsel, See Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Here it is clear Smith was offered the assistance of his appointed counsel to review the transcript, and he validly waived it. Nor is this a case in which the defendant ever invoked his right to have counsel present during questioning, or expressed his desire to deal with the police only through counsel. See Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85, 68 L.Ed.2d 378, 386 (1981). In any event, we also note that the defendant made only minor

typographical changes to the draft in question, which would have been admissible with or without defendant's corrections and signature, and which was cumulative of numerous other valid confessions. We find no error.

XI. PROSECUTORY CLOSING REMARKS

The defendant raises on appeal the following remark made by the prosecutor in his closing argument, in regard to the role of defense counsel. The prosecutor stated:

> Looking at jobs, Mr. Hippert's job was to get his client off. That's it. My job is to produce this evidence and argue from it and ask you to convict for a crime which Mr. Smith should not be let go. Mr. Hippert is asking you to let him go, to let him walk out of the courtroom after being involved in the things he did.

This remark was made in response to the following statement in defense counsel's closing argument:

> Now [the prosecutor], when he was standing up here said that your job or your purpose is to apply the law to the case.
>
> Well, his job is to make things easy for the government, to grease the wheels * * *.

Opposing counsel must timely object to any erroneous or improper statements made during closing argument or waive his right to the objection, except for fundamental error. State v. Denny, 119 Ariz. 131, 134, 579 P.2d 1101, 1104 (1978); accord State v. Young, 116 Ariz. 385, 386, 569 P.2d 815, 816 (1977) ("failure to object to a closing argument is a waiver of any right to review an appeal unless so prejudicial as to deny the defendant a fair trial.") It is also apparent that any error was invited by defendant. As we said in State v. Marvin, 124 Ariz.

555, 558, 606 P.2d 406, 409 (1980),

> We have recognized that improper remarks by the prosecution, if they are provoked by opposing counsel or are in retaliation for certain statements, are not grounds for reversal unless they are so prejudicial as to constitute reversible error. (Citations omitted.)

See also State v. Bowie, 119 Ariz. 336, 343, 580 P.2d 1190, 1197 (1978) ("In this case, the error, if any, in the prosecutor's comments, was invited by the defense counsel's closing argument. The appellant may not benefit from an error which he invited."); accord, State v. Purcell, 117 Ariz. 305, 308, 572 P.2d 439, 442 (1977). Thus under both the waiver and invited error doctrines, the above comments of the prosecutor do not require reversal unless they constitute fundamental error.

We are unable to find that the remark by the prosecutor in the instant case constitutes fundamental error. This remark was not of a highly prejudicial nature, so likely to inflame or bias the jury as to deny defendant his right to a fair trial. Even under the higher standard of scrutiny applied in cases where the question of a prosecutor's allegedly improper comment has been properly preserved for appeal, we would be unable to say this comment "probably influenced the jury's verdict." See State v. Sullivan, 130 Ariz. 213, 218, 635 P.2d 501, 506 (1981), quoting State v. Sustiata, 119 Ariz. 583, 594, 583 P.2d 239, 250 (1978). We find no reversible error.

XII. FAILURE TO INSTRUCT ON SECOND DEGREE MURDER

The defendant asserts that the trial court erred in failing to instruct the jury on second degree murder. In cases which may

result in the death penalty, the trial judge is required to instruct on lesser included offenses when the evidence would have supported such a verdict, regardless of whether requested to do so by the defendant. State v. Vickers, 129 Ariz. 506, 513, 633 P.2d 315, 322 (1981), citing to Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). The defendant argues that parts of his confession could have been interpreted to suggest a lack of premeditation by him, and thus the evidence could have supported a verdict of second degree murder. The trial judge apparently felt the confessions fairly read did not tend to negate the element of premeditation, as he rejected this argument and refused the instruction.

To support an instruction for second degree murder, the evidence reasonably construed "should tend to show lack of premeditation." State v. Moreno, 128 Ariz. 257, 261, 625 P.2d 320, 324 (1981). All of the relevant evidence at trial suggests that the kidnapping was still in progress at the time of the killing; there was no suggestion that Ms. Owen was free to leave at the time Smith began choking her. Furthermore, the uncontradicted evidence before the jury, including Smith's own statements, established that the reason for the killing was to prevent Ms. Owen from pressing charges of kidnapping and rape, and that the co-defendants knew this was the reason when they proceeded to kill her. The choking of Ms. Owen by Smith was the first of the acts in the sequence of stabbing, cutting and crushing with a rock that led to her death. Under these circumstances, we do not believe that the evidence supports a

claim of lack of premeditation on Smith's part. We hold that the trial court did not abuse its discretion in refusing the requested instruction.

XIII. HEARSAY STATEMENT TO OFFICER

Defendant argues that it was error for the court to refuse to admit into evidence an exculpatory hearsay statement made by the defendant to a police officer. Defendant suggests that the statement is admissible under either of the residual hearsay exceptions, Rules 803(24) and 804(b)(5), Arizona Rules of Evidence, 17A A.R.S.

Each of those residual exceptions require the out of court statement to have "equivalent circumstantial guarantees of trustworthiness" as the other stated hearsay exceptions. Id. In State v. Spratt, 126 Ariz. 184, 187, 613 P.2d 848, 851 (App. 1980), our Court of Appeals held that a defendant's out of court assertion of his innocence lacked equivalent sufficient circumstantial guarantees of trustworthiness to make it admissible under the residual exception of Rule 804(24), and therefore the statement was properly excluded. Similarly in State v. Duffy, 124 Ariz. 267, 275, 603 P.2d 538, 546 (App. 1979), the court held that the trustworthiness of defendant's self-serving out of court statements was "highly suspect," and therefore the trial court properly denied their admissibility. In the instant case the trial judge specifically stated as the reason for his ruling,

> * * * I'm going to deny the admission under either Exception 5 to Rule 804 or Exception 24 to Rule 803 on the grounds that it does not have the circumstantial guarantees of

> trustworthiness [or] that it is a statement sufficiently against his interest to bring it within the ambit of the rule.

We find no error.

## XIV. PROPRIETY OF SENTENCE UNDER ENMUND v. FLORIDA

The defendant claims that the death penalty is impermissible in this case under the rule announced in Enmund v. Florida, ____ U.S. ____, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), which places limits on the imposition of the death penalty based on accomplice or felony murder theories. The United States Supreme Court held in Enmund that imposition of the death penalty would violate the Eighth and Fourteenth Amendments where the defendant did not kill, attempt to kill, or intend to kill. Defendant argues that because his case was submitted on both premeditation and felony murder theories, the jury's verdict of guilty of first degree murder does not establish that he killed, attempted to kill, or intended to kill.

In State v. McDaniel, ____ Ariz. ____, ____, 665 P.2d 70, 81 (1983), we stated,

> We agree with the defendant's claim that in first degree murder cases where the jury is instructed on felony murder as well as premeditated murder, a general verdict finding the defendant guilty of first degree murder does not establish whether the defendant had in fact killed, attempted to kill, or intended to kill.

In order to insure compliance with the specific requirements of Enmund, we instructed our trial courts,

> * * * that in future cases where the jury might have found the defendant guilty of first degree murder based on a felony-murder theory, the trial judge must determine beyond a reasonable doubt prior to imposing a sentence

of death that the defendant killed, attempted to kill or intended to kill. Id. at ____, 665 P.2d at 81.

Although the trial in this case took place prior to State v. McDaniel, supra, the trial judge made findings in his Special Verdict of the type contemplated in that opinion. The trial judge held,

> THE COURT DOES FIND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT, ROBERT DOUGLAS SMITH, COMMITTED THE OFFENSE OF MURDER WITH * * * PREMEDITATION.
>
> THE COURT FURTHER FINDS while this defendant was legally accountable for the conduct of another under the provisions of A.R.S. 13-303, this defendant's participation was not min[o]r, but was MAJOR and that in addition thereto, that this defendant planned and premeditated the killing and consummated the act. * * *
>
> THE COURT FURTHER FINDS that this defendant did foresee that his conduct would cause the death of another person; that he deliberately intended to cause that death. * * * (Emphasis in original.)

The trial court clearly found that defendant both killed and intended to kill. The trial judge made specific findings that Smith and Lambright discussed killing the victim, that the killing commenced when Smith began strangling the victim, and that Smith held the victim while she was being stabbed. We have reviewed the record and find the evidence supports these findings. Because the defendant participated in the killing, and intended to kill, the death penalty is not impermissible under Enmund v. Florida, supra.

## XV. INDEPENDENT REVIEW

In each death penalty case we conduct an "independent review

of the facts that establish the presence or absence of aggravating and mitigating circumstances[,]" and then "determine for ourselves if the latter outweigh the former when we find both to be present." State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976) (citations omitted), cert. denied 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1976).

For the reasons stated today in State v. Lambright, we agree with the trial court that the aggravating circumstance set out in A.R.S. § 13-703(F)(6) was established, as the offense was committed in an especially cruel manner. The victim was made to suffer great mental anguish and physical pain prior to her death. Defendant Smith shares full responsibility for the cruelty toward Ms. Owen. In fact, he was the one who repeatedly raped the victim prior to murdering her. Cruelty was clearly established.

The evidence suggesting Smith also had a heinous and depraved attitude toward the crime is equivocal. The only evidence of a heinous and depraved attitude on the part of Smith was the uncorroborated testimony of Kathy Foreman that Smith was the person who requested that the tape "We Are the Champions" be played. Although admitting much of his participation in the crime, Smith denied this. On the other hand, there is evidence that Robert Smith tried to commit suicide soon after returning to Texas, both as a result of remorse over this crime, and a marital breakup prior to the trip. We find that the evidence presented does not establish beyond a reasonable doubt that Smith had a heinous and depraved attitude toward the crime.

The principal mitigation urged by defendant was minor

participation in the crime. This assertion was rejected by the trial court, and is also rejected by this court, for the reasons stated in the previous discussion regarding Enmund v. Florida. He further argues that the giving of a felony murder instruction in this case should be considered as mitigating. "The giving of a felony murder instruction is a mitigating circumstance only where there is some doubt as to defendant's specific intent to kill the victim. State v. Schad, 129 Ariz. 557, 574, 633 P.2d 366, 383 (1981), cert. denied 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 693 (1982)." State v. Gillies, ____ Ariz. ____, ____, 662 P.2d 1007, 1020 (1983). Accord State v. Zaragoza, 135 Ariz. ____, ____, 659 P.2d 22, 29 (1983). This asserted mitigation therefore does not apply to this defendant.

There was some testimony from family members that the defendant had polio as a small child which may have caused him some physical and brain damage, although the statutory mitigating circumstance of A.R.S. § 13-703(G)(1), substantial impairment of mental capability to appreciate wrongfulness of conduct or to conform conduct to the law, was not established in this case. The court does take notice that the defendant has a low intelligence; the last time his I.Q. was tested before he left school it measured seventy one, or approximately at the second percentile. Some of the testimony also suggested a troubled home life as a youth, and learning difficulties in school.

The court has also considered his lack of prior record of serious crime, the evidence suggesting remorse by defendant, his favorable adjustment to a new marital and parental responsibility

in the months preceeding his arrest, and the treatment accorded Kathy Foreman as further mitigation.

Having considered all the mitigation presented, we find that although it is significant, it is not sufficiently substantial to call for leniency in light of the extreme cruelty and brutality of the instant crime. The death penalty was properly imposed in this case.

## XVI. PROPORTIONALITY REVIEW

In cases where the death penalty is imposed we also conduct a proportionality review to determine "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendants." State v. Richmond, supra, 114 Ariz. at 196, 560 P.2d at 51.

For the reasons stated in State v. Lambright, we find that the disposition accorded Kathy Foreman, although disturbing, is not alone sufficient to require reversal of defendant's sentence.

This court must also look to the disposition of persons involved in other similar crimes. For the reasons stated in State v. Lambright, we find the disposition in this case to be proportional to the disposition of the following similar cases in which the death penalty was imposed, State v. Jeffers, ____ Ariz. ____, 661 P.2d 1105 (1983); State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1980); State v. Coja, 126 Ariz. 35, 612 P.2d 491 (1980); State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978); and not inconsistent with the following cases in which leniency was granted, State v. McDaniel, ____ Ariz. ____, 665 P.2d 70 (1983);

State v. Graham, ___ Ariz. ___, 660 P.2d 460 (1983); State v. Valencia, 132 Ariz. 248, 645 P.2d 239 (1982); State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981); State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979). Again, we believe that overall the penalty imposed in this case is proportional to the penalty imposed in similar crimes.

We have reviewed the record for fundamental error pursuant to A.R.S. § 13-4035, and find none.

The convictions and sentences are affirmed.

JAMES DUKE CAMERON, Justice

CONCURRING:

WILLIAM A. HOLOHAN, Chief Justice

FRANK X. GORDON, JR., Vice Chief Justice

JACK D. H. HAYS, Justice

FELDMAN, Justice, concurring in part; dissenting in part

I concur in the portion of the opinion affirming the conviction. My views on the use of dual juries are contained in my concurrence to State v. Lambright, ____ Ariz. ____, ____ P.2d ____ (1983) (No. 5594, filed this date).

I dissent from that portion of the opinion affirming defendant's sentence to death. The trial court found that Smith was a participant in the killing. However, the record indicates and the majority acknowledges that it was Lambright who used the knife and it was Lambright who "finished off" the victim by hitting her over the head with a rock. Smith claims that his participation in the act of murder was only minor and that the killing was done by Lambright and Kathy Foreman.

The trial court's findings are contrary to Smith's contentions. The trial court found beyond reasonable doubt that Smith, with premeditation, participated in the killing, that he helped to plan it, and that his participation in the actual act of murder "was MAJOR." (Emphasis in original.) Ordinarily, if the trial judge's findings are supported by the evidence we could affirm or, in a capital case where we are making an independent review, we could agree. I cannot agree in this case. On this record, the trial court's findings are necessarily based upon the testimony of Kathy Foreman. Evidently the trial judge believed her testimony. He certainly had a better opportunity than I to determine the credibility. It may well be that she told the truth. However, her motives for lying are clear. By testifying that both Lambright and Smith planned and took a major part in the crime, she has seen to their conviction and to the imposition of the ultimate sentence. By doing this, she has earned

immunity for herself, avoided the death penalty, and has not served even a day in jail.

The trial judge and the members of this court are "disturbed" and "appalled" by the treatment afforded Ms. Foreman. I join them in this. I am also appalled, however, by the fact that in the face of the many mitigating circumstances detailed by the court, including his low I.Q., Smith has been sentenced to death on the uncorroborated testimony of a witness whose motive for lying is patent. If the testimony given by Kathy Foreman is true, then Smith merits the death penalty. If, however, Kathy Foreman did not tell the truth, Smith does not merit the death penalty. No member of the majority has ever seen Kathy Foreman, but each member of the majority recognizes her motive to lie and each member of the majority is appalled. In my view, no decision on life or death should be allowed to stand on so fragile a foundation. For this reason, I believe that the court should exercise its discretion in performing its duty of independent review by reducing Smith's sentence to life without possibility of parole for 25 years.

STANLEY G. FELDMAN, Justice

E X H I B I T  2

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc



| | | |
|---|---|---|
| STATE OF ARIZONA, Appellee, v. JOE LEONARD LAMBRIGHT, Appellant. | ) | No. 5594 |

Appeal from the Superior Court of Pima County

Cause No. CR-05669

The Honorable Michael J. Brown, Judge

AFFIRMED

| | |
|---|---|
| Robert K. Corbin, The Attorney General<br>By William J. Schafer III and Barbara A. Jarrett<br>Assistant Attorneys General<br>Attorneys for Appellee | Phoenix |
| Thomas G. Martin<br>Attorney for Appellant | Tucson |

CAMERON, Justice

Defendant, Joseph Leonard Lambright, was tried before a jury and convicted of first degree murder, A.R.S. § 13-1105, kidnapping, A.R.S. § 13-1304(A)(3), and sexual assault, A.R.S. § 13-1406. In addition, the kidnapping and sexual assault were found to have been dangerous felonies, involving the infliction of serious physical injury, A.R.S. § 13-604. Defendant was

EXHIBIT 2

sentenced to death for the murder, to 21 years imprisonment for the kidnapping, and to 21 years imprisonment for the sexual assault, to be served consecutively to the sentence for kidnapping. The case was automatically appealed to this court pursuant to Rules 26.15, 31.2(b), Arizona Rules of Criminal Procedure, 17 A.R.S.; we have jurisdiction pursuant to Art. 6, § 5(3) of the Arizona Constitution, and A.R.S. §§ 13-4031 and 13-4035.

The issues we must decide on appeal are:

I. Does the use of a dual jury procedure at trial constitute reversible error?

II. Did the trial court lack venue over the homicide charge?

III. Were defendant's statements voluntary?

IV. Was it error to allow an official of the Pima County attorney's office to testify regarding the grant of immunity to an accomplice?

V. Did the trial court err in failing to give one of the defendant's proffered jury instructions?

VI. Is the Arizona death penalty statute unconstitutional?

VII. Is the statutory aggravating circumstance of killing in an "especially heinous, cruel, or depraved manner" unconstitutionally vague?

VIII. Is there a right to have a jury participate in sentencing where the death penalty is imposable?

IX. Is it unconstitutional to place the burden of proof of mitigating circumstances on the defendant?

X. Does this court find in its independent

review that the death penalty was appropriate in this case?

XI. Is the death penalty in this case proportionate to the disposition of other similar cases?

The facts necessary to a determination of this appeal are as follows. In February and March, 1980, Joseph Lambright, Robert Smith, a friend of Lambright's, and Kathy Foreman, Lambright's girlfriend, took a cross country driving trip. Beginning in Texas, where they resided, they first drove to Florida, returned to Texas, and continued on to Arizona. The trip was financed with muggings or purse-snatching and some occasional work. During the trip Lambright and Foreman were sexually involved, and frequently had intercourse in Smith's presence; sometimes this occurred in the car while Smith was driving.

When the group arrived in Arizona, they camped in the mountains outside Tucson. Lambright and Foreman again engaged in intercourse in the presence of Smith, and Smith became angry. He complained that Lambright had all the sex he wanted. Lambright asked why Smith "didn't go out and find somebody." Smith said it "wasn't so easy" and began walking off. The two men then walked away together and talked for several minutes.

The next day, 11 March 1980, the three went into Tucson and were having coffee at a Hobo Joe's restaurant, when Smith once again indicated he wanted a woman. At this point Foreman left to use the restroom. As she was returning, she testified that she overheard Lambright saying to Smith that Lambright "would like to kill somebody just to see if he could do it." When Foreman

inquired moments later what was going on, Lambright told her that they were going to go out and find somebody for Smith.

Lambright drove the group around Tucson for some time, and at approximately 3:30 p.m. they saw a young woman, the victim Sandy Owen, hitchhiking. They stopped and picked up the victim, who seated herself in the unoccupied back seat and said she wanted a ride to the food stamp office. They drove to the food stamp office, but when they arrived there they did not permit Ms. Owen to leave the car. Instead Lambright drove to the back of the building, got out of the car and jumped into the back seat with Ms. Owen. He told her to "shut up and be quiet and she wouldn't get hurt."

Smith got out of the front passenger's seat and into the driver's seat. He pulled the car away and began looking for the freeway. Foreman turned around and saw that the victim looked frightened, and appeared to be trembling. Foreman asked the victim how to get to the interstate. Smith told the victim to shut up, because she would not tell them the truth. They found Interstate 10, and proceeded northwest toward California. Lambright searched though the victim's purse, found a bottle of pills, and asked what they were for. The victim stated they were part of a mental therapy she was undergoing.

At some point Owen stated that she needed to use a restroom. They pulled the car off to the side of the interstate, and told her she could relieve herself behind some trees. Lambright had the victim take her shoes off so she would be unable to get away, and had Kathy Foreman accompany her to make sure she did not try

to run. The group got back into the car, now with Lambright driving and Smith in the back seat. Smith put a blanket and some clothes over the rear windows, and proceeded to rape the victim. When he had finished he snickered and said she had small breasts.

The car proceeded through Pinal County, turned off the interstate, and proceeded to some isolated mountains. Ms. Owen asked if her captors were going to release her, and they told her they would take her back and let her go. They left the car at the end of a dirt road and walked part way up one of the mountains to a level area, arriving near dusk. After building a fire, Lambright and Foreman had intercourse, and a few feet away Smith again raped the victim.

Smith then began choking Ms. Owen. She collapsed, and Smith retained his grip on her as she fell. Lambright stated the woman had to be killed, or else she could press charges for kidnapping and rape. Lambright took Foreman's knife out of its sheath and began stabbing the victim in the chest and abdomen, twisting the knife around inside of her. Smith held one of the victim's arms while she was being stabbed, and Foreman held the other arm. Foreman testified that after the stabbing Smith unsuccessfully tried to break Ms. Owen's neck by twisting her head. Then Lambright, Foreman or both began cutting deeply into the victim's neck with the knife; Foreman claimed that only Lambright cut the victim's neck, Smith claimed that it was done by both Lambright and Foreman, and Lambright claimed he could not remember who used the knife during the killing. The victim remained alive, and was at least semi-conscious, as she attempted to raise herself up on

one arm. Lambright picked up a large rock and hurled it at her head. Foreman testified that as he threw the rock he yelled "Die, bitch."

Jewelry was taken from the victim's body, and then rocks were piled on top of her. Lambright, Smith, and Foreman returned to the car and washed the blood off their hands. As they got back into the car and began driving to San Diego, the group engaged in a macabre celebration, playing a tape of music entitled "We Are the Champions." When they arrived in San Diego, they pawned a wedding ring belonging to Ms. Foreman. They continued on to Anaheim, California, to Las Vegas, Nevada, and then returned to Texas, where they were apprehended approximately a year later after a tip to police from someone who had been told about the crime. Each of the three persons made statements to the police.

The Pima County Attorney's Office decided to charge Lambright and Smith for their participation in the crimes, and to grant immunity to Foreman in return for her testimony. Lambright and Smith were extradited to Pima County and tried for kidnapping, sexual assault, and first degree murder. The case was assigned to the Honorable Michael V. Brown of the Pima County Superior Court. In light of the defendants' confessions, which were not totally interlocking, and the appearance of potentially antagonistic defenses, Judge Brown severed the cases of Lambright and Smith. Because most of the evidence was relevant to both defendants, however, the judge decided to hold a single "dual jury" trial, in which two separate juries were empaneled, each to decide the guilt or innocence of only one defendant, and each

permitted to hear only evidence admissible against that one defendant. The defendants were each convicted of first degree murder, kidnapping, and sexual assault, and both appeal their convictions and sentences. We examine Robert Smith's convictions and sentences in State v. Smith (No. 5595), filed this day. In the instant case we consider the convictions and sentences of Joseph Lambright.

## I. DUAL JURIES

In the pre-trial stages it appeared to the trial judge that this case could present problems under the doctrine of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Bruton prohibits the introduction of a defendant's statements to incriminate a codefendant in a joint trial, where the declarant is unavailable for cross-examination due to the assertion of his fifth amendment right to silence. In the instant case, the state intended to use statements of both Smith and Lambright at trial, and each of these statements incriminated both the declarant and the codefendant. Moreover, although the statements were substantially "interlocking," which might have allowed their admission under the exception to Bruton created in Parker v. Randolph, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979), the confessions did not overlap in all respects. After considering the confessions, and finding it impractical to attempt to edit out the portions incriminating the other defendant, the trial judge decided to sever the two cases. See Rule 13.4, Arizona Rules of Criminal Procedure, 17 A.R.S. However, because most of the evidence was admissible against both

defendants, and because the trial was expected to last over a week and included several out-of-state witnesses, rather than hold separate trials the judge decided to conduct a single trial using two juries.

Under this "dual jury" procedure, two juries were chosen from separate venires, each to decide the guilt or innocence of only one defendant. The trial was held in a courtroom in the federal courthouse in Tucson which was large enough to accommodate both juries. The two juries were kept physically separated, and were carefully instructed not to speak with persons on the other jury. When information relevant to both defendants was being presented, both juries remained in the courtroom. When evidence admissible against only one defendant was being presented, the jury for the other defendant was excused. When both juries were present, one sat in the jury box and the other sat in designated rows of chairs on the other side of the courtroom. The positions of the respective juries were alternated daily. Separate opening and closing arguments were made, each in front of one jury only. The juries were given separate instructions, and then sent to deliberate separately. When the first jury reached a verdict, it was not made public until the deliberations of the other jury had concluded. In the instant case both defendants were convicted on all counts, and each defendant assigns as error the use of the dual jury procedure.

It appears that a number of courts have approved the dual jury procedure. See, e.g. United States v. Hayes, 676 F.2d, 1359, 1366-67 (11th Cir.), cert. denied ___ U.S. ____, 103 S.Ct.

455, ___ L.Ed.2d ___ (1982); United States v. Rimar, 558 F.2d 1271 (6th Cir.), cert. denied sub nom. Rimer v. United States, 435 U.S. 922, 98 S.Ct. 1484, 55 L.Ed.2d 515 (1978); United States v. Rowan, 518 F.2d 685, 689-90 (6th Cir.), cert. denied sub nom. Jackson v. United States, 423 U.S. 949, 96 S.Ct. 368, 46 L.Ed.2d 284 (1975); People v. Wardlow, 118 Cal.App.3d 375, 382-387, 173 Cal.Rptr. 500, 502-05 (1981); People v. Brooks, 92 Mich.App. 393, 285 N.W.2d 307 (1979). These cases generally find that this procedure satisfies the defendants' constitutional rights as well as the end of judicial economy. See also United States v. Sidman, 470 F.2d 1158 (9th Cir. 1972), cert. denied 409 U.S. 1127, 93 S.Ct. 948, 35 L.Ed.2d 260 (1973) (holds procedure satisfies each of defendant's constitutional rights, including rights to impartial jury and due process). In addition to complying with the formal confrontational requirements of Bruton, the procedure may effectively avoid the "spectacle" of antagonistic defenses. People v. Brooks, supra, 92 Mich.App. at 396, 285 N.W.2d at 308.

Besides the courts which generally approve the dual jury procedure, there are courts which have given limited approval to the procedure, suggesting that appropriate guidelines be developed before the procedure is put into common use. See, e.g. United States v. Sidman, 470 F.2d 1158, 1170 (9th Cir. 1972); State v. Watson, 397 So.2d 1337, 1342 (La. 1981), cert. denied 454 U.S. 903, 102 S.Ct. 410, 70 L.Ed.2d 222 (1981).

Some other courts have discouraged or disapproved of future use of the procedure, finding the risks of error inherent in the

procedure too great. See, e.g. People v. Williams, ____ Ill.2d ____, ____ N.E.2d ____, slip op. at 4-7 (No. 51870, filed 16 April 1982), rev'd on other grounds 93 Ill.2d 309, 444 N.E.2d 136 (1982); Scarborough v. State, 50 Md.App. 276, 278-281, 437 A.2d 672, 674-76 (1981); State v. Corsi, 86 N.J. 172, 430 A.2d 210 (1981). The principal risk of this procedure appears to be that while both juries are present, there may be some unintentional disclosure or reference to information admissible against only one defendant which may constitute reversible error. The Illinois Supreme Court stated, "It is the possibility that inadvertent revelations will disclose to the separate juries the inadmissible evidence which concerns us." State v. Williams, supra, quoted in People v. Rainge, 112 Ill.App.3d 396, ____, 445 N.E.2d 535, 550 (1983). This risk is demonstrated by United States v. Sidman, supra, in which such an error actually occurred. During trial an inadvertent Bruton problem arose when in the presence of both juries the prosecutor was allowed to question a witness regarding a statement of defendant Sidman which incriminated both himself and his co-defendant. Although Sidman's conviction was affirmed, the co-defendant had to be retried.

Although implied authority for a multiple jury procedure has been found under Rule 14, Fed. Rules Crim. P., 18 U.S.C., governing severence of parties and offenses, United States v. Rowan, supra, 518 F.2d at 690, and under state rules with similar wording, People v. Church, 102 Ill.App.3d 155, 163-165, 429 N.E.2d 577, 584-85 (1981); State v. Corsi, supra, 86 N.J. at 175,

430 A.2d at 212-13, no such authority can be found in the Arizona Rules of Criminal Procedure. Specifically, our rule governing severence, Rule 13.4, Ariz. Rules Crim. P., 17 A.R.S., does not contain explicit authority for such a procedure, nor does it provide trial judges the broad discretion to "provide whatever other relief justice requires" as does the federal rule. Furthermore, our rules do not contain a provision analogous to Rule 57 of the Federal Rules of Criminal Procedure, which grants broad power to "proceed in any manner not inconsistent with these rules * * *." Cf. United States v. Sidman, 470 F.2d at 1170 (suggests district courts have authority to establish guidelines for multiple jury procedure under Federal Rule Crim. P. 57).

In Hare v. Pima County Superior Ct., 133 Ariz. 540, 542, 652 P.2d 1387, 1389 (1982), we recently pointed out,

> Following the adoption of the amended 1960 state constitution, this court was given exclusive power to make rules relative to all procedural matters in any court. Ariz. Const., art. 6, § 5, Subsec. 5, added 1960; State v. Blazak, 105 Ariz. 216, 462 P.2d 84 (1969). We have held that this rule-making power may not be supplemented or superseded by a Superior Court. Anderson v. Pickrell, 115 Ariz. 589, 566 P.2d 1335 (1977). We reenforced this constitutional position when we adopted Rule 36, Arizona Rules of Criminal Procedure, 17 A.R.S. (1973):
>
> > "Any court may make and amend rules governing its practice not inconsistent with these rules. No such rule shall become effective until approved in writing by the Supreme Court."
>
> This rule allows adoption of local rules of practice and procedure, but only with our approval. * * *

We further stated:

> * * * Nothing we say here should discourage courts, through the adoption of local rules, to carry out experiments which may improve the judicial process. Indeed, these efforts should be encouraged. But local rules must first be approved by this court * * *. Id. at 543, 652 P.2d at 1390.

It is clear that the "experiment" conducted in the instant case was unauthorized by this court. We thus must consider the question of prejudice to the defendant.

The authorities to date, including those cases which disapprove future use of the multiple jury procedure, are unanimous in refusing to reverse a conviction merely based on the use of this procedure, without some specific showing of prejudice. While it has been found that this procedure involves an inherent risk that prejudicial error may occur during the trial, the procedure itself has not been found to be prejudicial. Defendant's conviction has been uniformly upheld where the courts are unable to find any specific prejudice to the defendant. See United States v. Hays (11th Cir.), supra; United States v. Rimar (6th Cir.), supra; United States v. Rowan (6th Cir.), supra; United States v. Sidman (9th Cir.), supra; People v. Wardlow (Cal.App.), supra; People v. Williams (Ill.), supra; People v. Rainge (Ill.App.), supra; People v. Church (Ill.App.), supra; State v. Watson (La.), supra; Scarborough v. State (Md.App.), supra; People v. Brooks (Mich.App.), supra; State v. Corsi (N.J.), supra; State v. Hernandez, 163 N.J.Super. 283, 394 A.2d 883 (App.Div. 1978) (involving three juries). See also People v. Smith, 94 Ill.App.3d 969, 419 N.E.2d 404 (1981) (finds no prejudice resulted from dual jury procedure, but reverses

conviction on other grounds).

Defendant in the instant case can point to no specific error occurring at trial. The trial judge was meticulous in explaining the procedure to the jurors, properly admonishing the jurors, keeping the juries separated, and keeping the juries from being exposed to inadmissible material. Defendant argues that the judge erred in giving the jurors the following explanation for the procedure:

> For some legal reasons the evidence that the State will present, some of the evidence is admissible against Mr. Smith and not against Mr. Lambright; some of the evidence is admissible against Mr. Lambright but not against Mr. Smith.
>
> For that reason you are one of two juries that will be chosen this afternoon.

A substantially similar instruction was given to each jury. Defendant claims this instruction may have caused improper speculation on the part of the jurors. We believe that the above explanation of the procedure was more likely to reduce rather than increase speculation by the jurors. See also State v. Corsi, supra, 86 N.J. at 178-179, 430 A.2d at 213 (assertion that dual jury procedure causes speculation in the minds of the jurors rejected as a grounds for reversal). Furthermore, to the extent that through this explanation the jury became aware that there is evidence which they will not hear for legal reasons, we note that this occurs numerous times during the usual criminal trial whenever the judge sustains an evidentiary objection.

The main thrust of defendant's argument is that the dual jury procedure is inherently prejudicial, breeding confusion and

speculation in the minds of the jury. We join the overwhelming authority to the contrary, however, and find that the procedure is not inherently prejudicial. In light of the severity of the penalty in this case, we have reviewed the trial record with great care. We find no reversible error in the instant case.

We do not intend the current disposition to be taken as an approval of future use of this procedure. As noted above, because this procedure is unauthorized by our rules, trial courts must obtain the approval of the Supreme Court before conducting further trials in this manner. If proposed guidelines are presented for approval, we will then consider whether they successfully minimize the risks of this procedure while maintaining the benefit of conserving judicial resources.

We note that although courts have utilized the dual jury procedure in other murder cases, see e.g. People v. Church, supra; State v. Corsi, supra, including one in which the death penalty was given and affirmed, see State v. Williams, supra, we feel that death penalty cases are inappropriate vehicles for experimentation with new procedures, and the practice should be avoided in the future.

II. Venue

Article 2, § 24 of the Arizona Constitution provides, "In criminal prosecutions, the accused shall have the right * * * to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed. * * *" This provision is carried into effect by A.R.S. § 13-109 which specifically provides,

§ 13-109. Place of trial

A. Criminal prosecutions shall be tried in the county in which conduct constituting any element of the offense or a result of such conduct occurred, unless otherwise provided by law.

B. The following special provisions apply:

1. If conduct constituting an element of an offense or a result constituting an element of an offense occurs in two or more counties, trial of the offense may be held in any of the counties concerned; * * *. (Emphasis added.)

It is clear that the actual killing in this case took place in Pinal County. The defendant argues that venue on the homicide charge was improper in Pima County, where the trial was held.

The murder charge was based on both premeditation and felony murder theories. As to felony murder, our statute provides,

§ 13-1105. First degree murder; classification

A. A person commits first degree murder if:

* * *

2. Acting either alone or with one or more other persons commits or attempts to commit sexual assault under § 13-1406, * * * [or] kidnapping under § 13-1304 * * *, and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person.

Under this felony murder theory, the underlying felonies of kidnapping and sexual assault were elements of the first degree murder charge. It is clear that the kidnapping of Sandra Owen originated in Pima County. The uncontested evidence demonstrates that Sandra Owen was abducted in the parking lot of a food stamp office in Tucson, Pima County. The only counterargument offered

is that Ms. Owen voluntarily got into the automobile when she was first picked up hitchhiking. Under our criminal code,

> A person commits kidnapping by knowingly restraining another person with the intent to
>
> * * *
>
> 3. Inflict death, physical injury or a sexual offense on the victim, * * *. A.R.S. § 13-1304.

Further, our statutes provide that "Restraint is without consent if it is accomplished by: (a) Physical force, intimidation or deception; * * *." A.R.S. § 13-1301(2)(a). The uncontradicted evidence established that when the car reached the parking lot, Ms. Owen was not permitted to leave the car, but was forced to remain when Lambright jumped into the seat next to her, warned her to "shut up and be quiet and she wouldn't get hurt," and the car sped off with Smith at the wheel. Thus, the kidnapping began in Pima County. In addition, the evidence supports the trial judge's conclusion that the initial sexual assault, which took place while the car was in motion on Interstate 10, occurred while the defendants were still in Pima County. Because acts comprising an element of felony murder occurred in Pima County, venue was proper in Pima County under A.R.S. § 13-109, supra.

Because we have decided that venue was proper under a felony murder theory, we need not decide whether the evidence suggesting premeditation in Pima County was also sufficient to establish venue. See State v. Poland, 132 Ariz. 269, 275-76, 645 P.2d 784, 790-91 (1982) (evidence of premeditation in Yavapai County sufficient to support venue under A.R.S. § 13-109). Cf. State v.

Cox, 25 Ariz.App. 328, 331-32, 543 P.2d 449, 452-53 (1975) (forming of intent did not satisfy "overt act" requirement of former venue statute A.R.S. § 13-131).

III. VOLUNTARINESS OF STATEMENTS

Defendant Lambright was arrested at approximately 9:30 a.m. on 14 March 1981 at his place of work, Midway Auto Sales, located on Highway 62 in Orange County, Texas. The officers involved with the arrest were Thomas Latta, Assistant Chief Deputy of the Orange County Sheriff's Department, Bruce Simpson, Captain, Deputy Sheriff of the Orange County Sheriff's Department, Winston Padgett, a detective with the Texas Department of Public Safety who had worked on the investigation, and John Hebert, a Louisiana State Police trooper who had also helped in the investigation. Lambright was properly advised of his Miranda warnings at the time of the arrest, and he indicated he understood them. He was not questioned at that time. The officers transported Lambright to the Orange County Sheriff's Office, where he was booked and then permitted to make phone calls. When he had finished his phone calls, he was interviewed beginning around 10:15 a.m. He spoke to officers Padgett and Simpson for approximately forty-five minutes, and then spoke to officer Hebert for another forty-five minutes. During this period defendant was not handcuffed, and was permitted to smoke cigarettes and drink coffee. He gave a detailed account of the crime, including his participation in it, except that he said he "couldn't remember" who actually wielded the knife.

The trial judge held these statements were voluntary. As we

said in State v. Arnett, 119 Ariz. 38, 42, 579 P.2d 542, 546 (1978), "[T]he State must show 'by a preponderance of the evidence' that the confession was freely and voluntarily made. The trial court must look to the totality of the circumstances surrounding the giving of the confession, as presented at 'voluntariness' hearings, and decide whether the State has met its burden. However, the trial court's determination of admissibility will not be upset on appeal absent clear and manifest error." (Citations omitted.) Quoted in State v. Osbond, 128 Ariz. 76, 78, 623 P.2d 1232, 1234 (1981). Accord State v. Dalglish, 131 Ariz. 133, 137, 639 P.2d 323, 327 (1982). We are unable to find any clear and manifest error in the instant case. There was nothing inherently coercive regarding these interviews, considering the time of day, duration, number of officers involved, or any other surrounding circumstances.

At the voluntariness hearing Lambright testified that during the drive to the sheriff's office one of the officers conspicuously displayed a gun and said that it could make a big hole in a person. This was specifically denied by each of the police officers who rode in the car with Lambright. Lambright also stated that when he was permitted to telephone his sister and his boss, he asked those persons to arrange to get him a lawyer, and Lambright believed that the officers overheard these requests. Each of the arresting officers denied overhearing any such conversation. Lambright further claimed that at the beginning of the interview he stated that he thought he should talk to an attorney. Officer Padgett, who was the first person

to enter the room and began the interview, denied at trial that defendant ever made such a statement. Finally, Lambright claimed that the officers alluded to another case involving multiple defendants and stated that the first person to confess got a better deal. Each of the three officers who interviewed the defendant denied making such a reference or hearing any other officer make such a reference.

After hearing this conflicting testimony the trial judge found these statements were voluntarily given. The trial judge had an opportunity to assess directly the demeanor of the witnesses and determine their credibility. After hearing the witnesses, the trial judge was free to reject the allegations of the defendant in favor of the facts as related by the officers. We are unable to find clear and manifest error in the admission of these oral statements given to the police.

After concluding the oral statements, Lambright was asked if he would make a written statement. He agreed to do so, and was read his rights again. He had just begun to write out a statement when he was interrupted by the arrival of a judge at approximately 12:10 p.m. to secure a waiver of extradition which Lambright had indicated he was willing to give. The judge gave Lambright an additional Miranda warning, and then read him a statement regarding extradition. Lambright then asked some complex questions regarding the extradition process. The judge responded that he could not give Lambright legal advice, and without Lambright requesting one, the judge decided to provide Lambright an attorney, and called an attorney on the telephone.

After talking with the lawyer, Lambright told the judge and officers present that the attorney had told him not to make any further statements. All questioning ceased, and Lambright was transferred to the County Jail.

After extradition had been arranged, Gary Dhaemers, homicide detective with the Pima County Sheriff's Department, went to Texas in May 1981 to return Lambright to Arizona. Dhaemers told Lambright at the outset that he would not talk to him about the case because Lambright had an attorney. When they arrived in Tucson and were entering the holding area of the court building, Lambright stated to Dhaemers "I probably owe you a complete confession." The trial court properly found this spontaneous remark which was unsolicited and clearly voluntary to be admissible. We find no error in the trial court's determination of the admissibility of his statements to the police.

IV. ASSOCIATE OF PROSECUTOR AS WITNESS

Defendant argues that the trial court erred in allowing a member of the Pima County Attorney's Office to testify. The defendant generally objected to Deputy County Attorney Paul Banales' testimony concerning Kathy Foreman's story of the crime because of "the fear that the jury will consider the testimony of a prosecutor to be more credible than that of the other witness[es]." The context of Banales' testimony here, according to the defendant, renders this fear particularly palpable. Banales testified at trial that Kathy Foreman's story never varied in its particulars before and after he granted her immunity. According to the defendant, Banales' testimony thus

had a substantial impact on a key issue in the case -- the credibility of the prosecution's eye witness.

The defendant did not object at trial to Banales' specific comment regarding the consistency of Foreman's story, and we do not believe that admitting the comment was error. That Foreman was an interested witness is beyond dispute; her immunity from prosecution was contingent on her testifying against the co-defendants, as the jury was advised. The credibility of a witness and the weight and value to be given her testimony are questions for the trier of fact. State v. Spoon, No. 5224, filed 6 July 1983, slip op. at 14; State v. Pieck, 111 Ariz. 318, 529 P.2d 217 (1974). The jury would have considered the conditions under which Foreman testified, as well as Banales' comment, in deciding how much credence to give her testimony. We believe on review of the evidence that Banales' testimony had little impact on a jury that assessed first-hand the credibility of a witness subjected both to direct examination and to searching cross-examination by two defense attorneys. Moreover, the jury knew that Banales was involved in the early stages of the instant proceedings, and had made the offer of immunity. It therefore knew that the "corroboration" implicit in Banales' statement was from a source interested in the outcome of the trial. We believe, therefore, that the jury was able to place Banales' remark in context, and to accord it the appropriate weight.

As to the general contention that a prosecutor's testimony is inherently prejudicial to a defendant because of the status of the witness, we have said that the weight and credibility to be

accorded to witnesses who are involved in upholding the law are jury matters. See Baumgartner v. State, 20 Ariz. 157, 178 P. 30 (1919); Duff v. State, 19 Ariz. 361, 171 P. 133 (1918). In the instant case it was not the prosecutor who was trying the case who appeared as a witness, but another person from the same office, who was not participating in the trial. The concerns we have about the county attorney also being a material witness in the crime he is prosecuting do not apply in this case. We find no error.

## V. FAILURE TO GIVE JURY INSTRUCTIONS

The next allegation of error concerns the trial court's failure to give defendant's requested jury instruction no. 10, which read:

> There are two defendants. You must consider the evidence in the case as a whole. However, you must consider the charge against each defendant separately. You must not be prejudiced against one defendant simply because you determine that the State has proved its case against another defendant.

The failure to give instructions which are not correct statements of the law or do not fit the facts of a particular case is not error. State v. Axley, 132 Ariz. 383, 393, 646 P.2d 268, 278 (1982); State v. Reinhold, 123 Ariz. 50, 57, n. 4, 597 P.2d 532, 539, n. 4 (1979); State v. Rhymes, 107 Ariz. 12, 14, 480 P.2d 662, 664 (1971). The above instruction to the jury that it "must consider the charge against each defendant separately" was an incorrect statement of the law given the dual jury procedure. The trial judge correctly pointed out that each of the juries in this case were supposed to consider the charges

against only one defendant, not to consider the charges against each defendant separately. This instruction was an incorrect statement of the law, had the potential for confusing the jury, and therefore was properly refused.

We also note that the trial judge correctly instructed the jurors,

> The only matter before you for your decision is the guilt or innocence of the particular defendant.

"If the substance of the proposed instruction is adequately covered by instructions actually given by the court, there is no error in their being refused. State v. Cookus, 115 Ariz. 99, 563 P.2d 898 (1977)." State v. Gretzler, 126 Ariz. 60, 89, 612 P.2d 1023, 1052 (1980). Accord State v. Melendez, 121 Ariz. 1, 5, 588 P.2d 294, 298 (1978).

VI. CONSTITUTIONALITY OF ARIZONA DEATH PENALTY STATUTE

Defendant claims that the Arizona death penalty statute, A.R.S. § 13-703, is unconstitutional in that it is cruel and unusual punishment contrary to the eighth amendment. This issue has been resolved adversly to defendant's position on numerous occasions. State v. Gretzler, ___ Ariz. ____, ____, 659 P.2d 1, 12, cert. denied ____ U.S. ____, 103 S.Ct. 2444, ____ L.Ed.2d ____ (1983). See also State v. Gillies, ____ Ariz. ____, ____, 662 P.2d 1007, 1014 (1983); State v. Woratzeck, 134 Ariz. 452, 456, 657 P.2d 865, 869 (1982).

VII. VALIDITY OF STATUTORY AGGRAVATING CIRCUMSTANCE OF "HEINOUS, CRUEL OR DEPRAVED"

Defendant also claims that the statutory aggravating

circumstance prescribed by A.R.S. § 13-703(F)(6), killing in an "especially heinous, cruel, or depraved manner," is unconstitutionally vague. We have considered and rejected this claim in prior cases. State v. Gretzler, supra, ____ Ariz. at ____, 659 P.2d at 9. See also State v. Jeffers, ____ Ariz. ____, ____, 661 P.2d 1105, 1131 (1983); State v. Zaragoza, ____ Ariz. ____, ____, 659 P.2d 22, 27 (1983).

VIII. RIGHT TO JURY SENTENCING

Defendant asserts that he has a right to have a jury participate in sentencing when the death penalty is a possible outcome. This assertion has also been rejected by the court numerous times. State v. Gretzler, supra, ____ Ariz. at ____, 659 P.2d at 15. See also State v. Richmond, ____ Ariz. ____, ____, ____ P.2d ____, ____, slip op. at 5 (No. 2914, filed 12 May 1983).

IX. BURDEN OF PROOF ON MITIGATING CIRCUMSTANCES

Defendant also argues that placing the burden of proof on defendant to prove mitigating circumstances, see A.R.S. § 13-703(C), violates due process. Several of our cases hold to the contrary. State v. Richmond, supra, slip op. at 5; State v. Blazak, 131 Ariz. 598, 602, 643 P.2d 694, 698 (1982); State v. Smith, 125 Ariz. 412, 416, 610 P.2d 46, 50 (1980).

X. INDEPENDENT REVIEW

In every case in which the death penalty is imposed we conduct an "independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances." State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (citations omitted), cert. denied 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d

1101 (1976). We further "determine for ourselves if the latter outweigh the former when we find both to be present." Id.

In the instant case the trial judge found the evidence established the aggravating circumstance set out in A.R.S. § 13-703(F)(6), that the "defendant committed the offense in an especially heinous, cruel, or depraved manner." Cruelty has been specifically defined to involve the infliction of pain on the victims. We have also stated that our concept of cruelty involves not only physical pain, but also mental distress visited upon the victims. State v. Gretzler, supra, ____ Ariz. at ____, 659 P.2d at 11. In State v. Tison, 129 Ariz. 526, 633 P.2d 335 (1981), we found cruelty based on the infliction of such emotional distress. There the victims were held by armed captors for an extended period, forced at gunpoint to move from place to place, and finally compelled to witness other family members being shot to death while awaiting their own executions. In this case the victim was abducted and driven away from the city in which she was picked up by her captors. She was described as being scared and trembling as she sat in the back seat of the car. During the drive she was sexually assaulted. She was then taken to an isolated location, and placed in obvious fear for her life, as evidenced by her asking her captors if they intended to let her go. She was then sexually assaulted a second time before being killed. As was the case in State v. Tison, supra, we are able to find cruelty based on the "great degree of mental pain" inflicted on the victim during the course of this crime. 129 Ariz. at 543, 633 P.2d at 352.

In addition to the mental pain involved, the manner of killing was one which was physically painful to the victim. Ms. Owen was choked and then stabbed in the chest and abdomen. The knife was twisted and turned while it was inside her. Her throat was then cut deeply. After these attacks she remained alive and was still conscious, as she raised herself up on one elbow when her assailants turned to leave. Lambright then returned and threw a large boulder down on her head. The victim, who was conscious during this series of violent attacks, must have suffered great physical pain. The statutory element of cruelty is established.

The statutory concepts of heinous and depraved go to the mental state and attitude of the perpetrator as reflected in his words and actions. State v. Poland, supra, 132 Ariz. at 285, 645 P.2d at 800; State v. Tison, supra, 129 Ariz. at 543, 633 P.2d at 352. The evidence also supports a finding that Lambright had a heinous and depraved attitude during this crime. In State v. Gretzler, supra, ____ Ariz. at ____, 659 P.2d at 10-12, we identified specific factors which lead to a finding that the crime was committed in a heinous and depraved manner. One of these factors is the relishing of the murder. In State v. Clark, 126 Ariz. 428, 437, 616 P.2d 888, 897, cert. denied 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), we found the murderer had a depraved state of mind where he "kept a spent bullet as a grisly souvenir of his crime." In the instant case, when the defendant was arrested one year after the murder he was wearing a necklace with a charm that had belonged to Ms. Owen. When the

authorities inquired about the charm, Lambright told them he "kept it as a m[e]mento of the trip." A heinous and depraved state of mind is also demonstrated by Lambright's participation in the macabre celebration of the killing during which the group played the song "We Are the Champions."[1] As mitigation the defendant presents his lack of a record of prior violent crime, an honorable discharge from the military, an asserted unsettled family life as a child, and the fact that Kathy Foreman was granted immunity for her testimony, which is discussed more fully infra. While we have considered all the mitigation suggested by defendant, we do not find it sufficiently substantial to outweigh the aggravating circumstance and to call for leniency. See A.R.S. § 13-703(E). The death penalty was properly imposed in this case.

XI. PROPORTIONALITY REVIEW

In addition to conducting an independent review of the propriety of each death sentence, we also conduct a proportionality review to determine "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." State v. Richmond, supra, 114 Ariz. at 196, 560 P.2d at 51. Accord State v. Gretzler, supra, ___ Ariz. at ___, 659 P.2d at 17.

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[1] Because of the strong evidence cited above reflecting Lambright's heinous and depraved attitude toward the killing, we need not also rely on Foreman's uncorroborated testimony that Lambright stated before the crime he "would like to kill somebody just to see if he could do it," and said "Die, bitch" as he threw the rock on the victim's head.

Our initial inquiry is whether the disposition accorded to Kathy Foreman, who received immunity in return for her testimony against Lambright and Smith creates a disproportionate result. While a more lenient sentence received by an accomplice has been considered along with other mitigating circumstances in determining whether to impose the death penalty, see State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981) (leniency granted to accomplice together with numerous other mitigating circumstances sufficiently substantial to reduce death sentence to life imprisonment), our cases have held that the mere fact that an accomplice has received leniency does not in itself prevent the imposition of the death penalty.

In State v. Gillies, supra, where one defendant was tried and received the death penalty, and his accomplice plead guilty and was sentenced to life imprisonment, we noted that, "[a]ny resulting inequity between the two sentences is a consequence induced by our plea-bargaining system." ____ Ariz. at ____, 662 P.2d at 1022. Similarly, in State v. Gerlaugh, ____ Ariz. ____, 659 P.2d 642 (1983), in which defendant Gerlaugh was also tried and sentenced to death, it was noted that the charges against an accomplice were disposed of through a comprehensive plea agreement under which he was given life sentences on some of the charges together with a twenty-one year sentence on another charge. ____ Ariz. at ____, n. 1, 659 P.2d at 644, n. 1 (concurring opinion). More directly on point, in State v. Richmond, supra, another death penalty case, we specifically considered the fact "that both Rebecca Corella and Faith Erwin

were involved in the crime but were never charged." ____ Ariz. at ____, ____ P.2d at ____, slip op. at 14. In none of the above cases did we find that the prosecutorial discretion exercised toward other participants in the crime rendered improper the particular defendant's death sentence. Although Foreman managed to escape prosecution by offering her testimony in return for immunity, we note that the other person brought to trial in this case, Robert Smith, has been given the same sentence received by Lambright. While the disposition of other persons involved in the crime is an important factor in determining the proportionality of a capital sentence, the court must also consider the propriety of the sentence in relation to the disposition of persons involved in other similar crimes.

Having reviewed other crimes involving the same aggravating circumstance found in the instant case, we find that the death sentence received by defendant Lambright is proportional to the disposition of the persons involved in those crimes. In State v. Jeffers, supra, State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1980), State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980), State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied 435 U.S. 908, 98 S.Ct. 1453, 55 L.Ed.2d 500 (1978), each of the defendants was convicted of a murder in which the sole aggravating circumstance was that the crime was found to have been committed in an especially heinous, cruel, or depraved manner under A.R.S. § 13-703(F)(6), and each received the death penalty.

We find also that Lambright's sentence is not

disproportionate to other cases in which this court has held that leniency was appropriate in light of more compelling mitigating circumstances than are present here. See State v. McDaniel, ___ Ariz. ___, ___ P.2d ___ (No. 4220-2, filed 28 April 1983) (defendant did not intend to kill); State v. Graham, ___ Ariz. ___, 660 P.2d 460 (1983) (substantial mental impairment due to medically-induced drug addiction, neurological problems, and brain damage; vulnerability to influence; lack of prior record of violence); State v. Valencia, 132 Ariz. 248, 645 P.2d 239 (1982) (extreme youth of defendant -- sixteen years old at the time of his crime); State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981) (convincing evidence of change of defendant's character and goals while in prison; youth of defendant; murder occurred as the result of a shootout begun by robbery victim); State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979) (substantial mental impairment due to brain lesion).

While we believe that overall considerations of proportionality favor imposition of the death penalty in this case, we are disturbed by the treatment accorded Kathy Foreman. After viewing the evidence and hearing the testimony in this case, the trial judge concluded that Kathy Foreman was "equally guilty" with Smith and Lambright. By her own admission she assisted Smith and Lambright in restraining the victim when the car was stopped briefly, and she held one of the victim's arms while she was being stabbed. Furthermore, it does not appear the information she had to offer was unique or essential. At the time she was granted immunity Lambright and Smith were already in

custody for these crimes, and each had confessed.[2] Foreman did agree to try to lead authorities to the victim's body, but each of the other participants had already demonstrated a similar willingness by drawing maps for authorities to use in their search. After reviewing the record in this case the trial court stated that the granting of complete immunity to Kathy Foreman was "appalling." We agree. We must remind prosecuting attorneys that the favorable treatment accorded to an accomplice can, under different facts, be given weight in considering the proportionality of a capital sentence.

We have reviewed the record for fundamental error pursuant to A.R.S. § 13-4035, and find none.

The convictions and sentences are affirmed.

JAMES DUKE CAMERON, Justice

CONCURRING:

WILLIAM A. HOLOHAN, Chief Justice

FRANK X. GORDON, JR., Vice Chief Justice

JACK D. H. HAYS, Justice

[2] We are also unable to find circumstances surrounding these confessions which would cause a prosecutor substantial concern over their admissibility.

FELDMAN, Justice, specially concurring.

I concur with the result and with much of the reasoning contained in the opinion. I write because I disagree with the court's conclusion that the use of dual juries was equivalent to the adoption of a local rule without sanction of this court.

This record contains no hint that the Superior Court of Pima County has adopted a general procedure to be applied in cases with "Bruton problems" or in similar cases where the objective of efficient and prompt administration of justice conflicts with the necessity of providing defendants with a fair trial. The record does indicate that the trial judge correctly concluded that defendant's right to a fair trial required a severance. However, he was informed that if the two cases were severed, each trial would consume approximately three weeks and that the prosecution intended to call several out-of-state witnesses. Thus, successive trials would have resulted in a disproportionate expenditure of court, witness and jury time, with the attendant expense and inconvenience.

To handle this problem, the judge decided to sever the cases but to hold both trials at once, with two separate juries in the same courtroom. As the majority correctly indicates, careful precautions were taken and neither defendant was prejudiced in any manner. I see no reason to chastise the trial judge for using the procedure, nor any ground to conclude that he made some special rule of local procedure without sanction of the supreme court. More importantly, I see no reason to inhibit other trial judges from using innovative techniques when required in a particular case in order to meet the ever-growing problems of the system.

Rule 36, Rules of Criminal Procedure, 17 A.R.S. (1973), should be interpreted to require advance consent by this court only for the adoption

of "rules of court" which set standards of procedure to be applied to all cases or to all cases of certain classes. "A rule of court prescribes a procedural course of conduct that litigants are required to follow, the failure to comply with which may deprive the parties of substantial rights." Hare v. Superior Court, 133 Ariz. 540, 542, 652 P.2d 1387, 1389 (1982). What we have here is not a rule of procedure for litigants; it is an order -- the exercise of an individual judge's discretion to use a particular technique in order to meet a specific problem. In my view, where the trial judge innovates in accomodating the requirements of a particular case, we are dealing with a discretionary function rather than with "rule making." Trial judges have inherent power and discretion to adopt special, individualized procedures designed to promote the ends of justice in each case that comes before them. Schavey v. Roylston, 8 Ariz.App. 574, 575, 448 P.2d 418, 419 (1968) (Judge had inherent power to exclude spectators even though the rule permitting this had been repealed.), 20 Am.Jur.2d, Courts §§ 79 and 81. Such discretion -- and thus the procedure adopted in the case at bench -- is expressly recognized by Rule 611, Rules of Evidence, 17A A.R.S., which permits the trial court to "exercise reasonable control over the mode [of] . . . presenting evidence so as to . . . avoid needless consumption of time . . . ."

The court of appeals recently considered a procedure followed by a judge who allows jurors to submit questions for witnesses. State v. LeMaster, ____ Ariz. ____, ____ P.2d ____ (App. 1983) (No. 1 CA-CR 5881, filed July 15, 1983, review denied September 9, 1983). The court approved the procedure -- properly in my view -- even though it applied to all cases that come before the judge in question and is, therefore, much more of a "rule" than the "one-time" procedure followed in the case at bench. It was

not and has never been suggested that a trial judge must get the approval of this court before deciding whether or how to allow jury questions to witnesses. The same may be said of methods of settling jury instructions, handling motions in limine, conducting pretrial conferences, holding settlement discussions, regulating argument, handling objections and numerous other aspects of trial procedure. In fact, no procedure exists whereby a trial judge can obtain the opinion of this court, in advance, before using some technique which, although not prohibited, is not expressly permitted by rule.

The inherent discretion of each trial judge to control his or her own courtroom is one of the strong points of the common law. Of course, we must draw the line where a trial judge institutes procedures contrary to the rules or inconsistent with their spirit. At the same time, we must leave the trial judge free to adopt procedures and techniques for individual cases which present problems not specifically covered by the rules. I believe that this court should support such efforts and that the position taken today is a step backward.

STANLEY G. FELDMAN, Justice